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MEMORANDUM OF LAW

DATE: October 10, 2002
TO: Scott Peters, Councilmember, District 1
FROM: City Attorney
SUBJECT: Imposing Tolls on Nonresidents for Use of Public Streets

QUESTION PRESENTED

May the City of San Diego [City] charge only nonresidents of the City a toll for using the public roads within the City?

SHORT ANSWER

No. A toll imposed solely on nonresidents for the use of public streets is unconstitutional.

ANALYSIS

I. REGULATION OF TRAVEL ON PUBLIC ROADS IS PREEMPTED BY STATE LAW.

The establishment of toll roads is governed by the California Streets and Highways Code, which gives exclusive jurisdiction to the California Department of Transportation over the operation of toll roads and the taking and keeping of tolls, but preserves the right of local governments to construct, acquire, or condemn toll roads in accordance with laws authorizing the issuance of revenue bonds. Cal. Sts. & Hy. Code §§ 30800, 30812, 30813; *Bartram v. Central Turnpike Co.*, 25 Cal. 283, 290 (1864); 58 Op. Cal. Att’y Gen. 804, 805 (1975); 37 Cal. Jur. 3d *Highways and Streets* § 144 (2001). Outside the formal establishment of a toll road, local governments have no authority to impose a fee for the use of public roads.

It is manifest public policy that “ ‘the streets of a city belong to the people of the state, and every citizen of the state has a right to the use thereof, subject to legislative control’ ” *Rumford v. City of Berkeley*, 31 Cal. 3d 545, 549 (1982) (citations omitted). The use of public roads for travel and transport are not a mere privilege, but a fundamental right. *Id.* at 550.

The state legislature has entirely regulated street traffic. Its intent to do so is expressed in California Vehicle Code section 21, which states: “Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein.” Cal. Veh. Code § 21; *Rumford*, 31 Cal. 3d at 550. Consequently, “unless express authority is granted, a local government has no authority to regulate or control any matter covered by the Vehicle Code.” *Biber Electric Co. v. City of San Carlos*, 181 Cal. App. 2d 342, 344 (1960); *see also, Atlas Mixed Mortar Co. v. City of Burbank*, 202 Cal. 660 (1927). The Supreme Court has stated that travel on public roads is a matter of statewide concern and state law thus preempts local regulation. *Rumford*, 31 Cal. 3d at 549-550, n. 3. Permission to collect tolls or charges for travel on public roads must thus be specifically granted by state law

California Vehicle Code section 23301 covers toll charges, but does not convey any rights on local governments to impose tolls. Further, Vehicle Code sections 21100 et seq. address local traffic regulation. A review of those sections revealed no express authority to charge a fee for the use of public roads. *See also* 59 Op. Cal. Att’y Gen. 329, 333-334 (1976). Finally, Vehicle Code section 21101.6 specifically precludes local authorities from placing “gates or other selective devices on any street which deny or restrict the access of certain members of the public to the street, while permitting others unrestricted access to the street.” Thus, a local government is not authorized to exact payment as a prerequisite to travel over city streets.

II. IMPOSITION OF A TOLL SOLELY ON NONRESIDENTS WOULD BE UNCONSTITUTIONAL.

In addition to the above issues, imposing a user fee solely on nonresidents implicates a number of constitutional rights. The most directly impacted is the right to travel.

Citizens have a constitutional right to travel freely throughout and within all the states of the union. *Saenz v. Roe*, 526 U.S. 489, 498-501 (1999); *Shapiro v. Thompson*, 394 U.S. 618, 629-630 (1969), *overruled on other grounds*, 415 U.S. 651 (1974); *U.S. v. Guest*, 383 U.S. 745, 757-759 (1966). Although this right finds no explicit mention in the Constitution, it has been well-established and repeatedly recognized as a fundamental personal right. *Saenz*, 526 U.S. at 498; *Shapiro*, 394 U.S. at 630; *Guest*, 383 U.S. at 757.

The Court has established the following three-prong test for determining whether a “user” fee, such as that proposed here, violates the right to travel: (1) whether the fee discriminates against interstate commerce or travel; (2) whether the fee represents a fair approximation of the use of the facilities by those who pay the fee; and (3) whether the fee is excessive in relation to the cost of the benefits conferred. *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 714-720 (1972), *holding superseded by statute on other grounds*, 49 U.S.C. App. § 1513(a).

On its face, the proposed fee structure discriminates against all non-San Diego residents. This includes citizens engaged in both intrastate and interstate travel and commerce. Thus, the proposed fee structure fails the first prong of the test and will not pass constitutional muster.

In addition, the proposed fee structure raises equal protection concerns because it creates different classes of citizens based on residency. *See Saenz*, 526 U.S. at 499 (durational residency requirement for welfare benefit eligibility violated equal protection clause); *Shapiro*, 394 U.S. at 633 (classification penalizing a fundamental right, like the right to travel, is unconstitutional unless necessary to promote a compelling governmental interest); *County of Alameda v. City of San Francisco*, 19 Cal. App. 3d 750, 756-757 (1971) (city and county ordinance which imposed income tax on citizens who were employed within city or county, but lived elsewhere, violated equal protection clause). Moreover, it is arguably in violation of the Commerce Clause. *See American Trucking Assn., Inc. v. Scheiner*, 483 U.S. 266, 289-292 (1987) (marker fees and axle tax placing much higher charge on out-of-state vehicles for privilege of using roads violated Commerce Clause); *Edwards v. California*, 314 U.S. 160, 172-177 (1941) (statute which made the knowing transport of a nonresident “indigent person” into the state a misdemeanor violated the Commerce Clause). Such classification may be illegal without a compelling governmental interest justifying it.

CONCLUSION

Local governments may establish toll roads via the procedures outlined in the Streets and Highways Code. Aside from the formal establishment of a toll road, local governments do not have the authority to charge a fee as a prerequisite to the use of public roads. Finally, imposing a toll only on nonresidents would be unconstitutional.

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